

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1345

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Pg 5

IN THE
United States Court of Appeals
For the Second Circuit

No. 76-1345

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against
RALPH JACOBSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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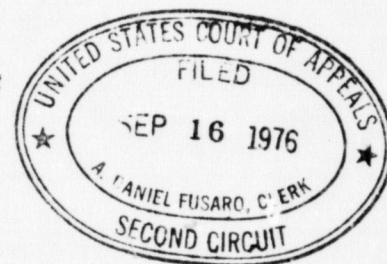


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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76 - 1345

UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

-against-

RALPH JACOBSON,

Defendant-Appellant.

BRIEF FOR APPELLANT
RALPH JACOBSON

Preliminary Statement

The Appellant Ralph Jacobson appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York (Lasker, J.), adjudging him guilty of one count of violating Title 26, United States Code, Section 7206(1) which related to the submission of an allegedly false and fraudulent income tax return for the calendar year

1968. As a result of this conviction, Appellant was sentenced to a three-year term of imprisonment. Appellant is presently at liberty on a personal recognizance bond pending this appeal.

The indictment appears on page 4 of Appellant's Appendix.

STATEMENT OF THE FACTS

The facts of this case may be simply stated. This prosecution stemmed from Appellant's alleged failure to report interest income received from one Theresa Lissauer during the calendar year 1968.^{1/} The theory on which the Government proceeded to trial was that during 1968, Appellant collected interest from usurious loans made to Mrs. Lissauer, which interest was not reported on his 1968 federal income tax return. In support of these allegations, the Government principally relied on the testimony of Mrs. Lissauer.

At all times relevant to these charges, Theresa

^{1/} This charge, on which Appellant was convicted, was contained in Count One of the indictment. A second count of the indictment charged Appellant with omitting interest income received from Lissauer and other income derived from a capital gain transaction in 1969. Appellant was acquitted on this second charge. (A 260)

Lissauer was the proprietor of a ladies' dress shop located on Queens Boulevard, in the Borough of Queens.^{2/} In 1968, the dress shop, known as Madame Lissauer's, and Mrs. Lissauer personally, were plagued by financial difficulties. (T 139)^{3/}

"Q What were your financial conditions and circumstances in 1968 - 1969?

A Very precarious. I was constantly in need of money.

Q Would you say it was somewhat desparate?

A Very much so." (T 139 - 140)

Mrs. Lissauer testified that one of her employees, a saleswoman by the name of Trudy Tannenbaum, offered to help mend her financial fences by introducing her to a friend who would loan her money. (T 141) After Tannenbaum placed a telephone call, Appellant Jacobson came to the shop and examined the merchandise and the sales books. (T 143) According to the witness, Jacobson then advanced \$1,500.00 "for a week or so." (T 143) At the time this loan was made, the terms of repayment were not

^{2/} The witness, when sworn, gave her name as Theresa Lissauer Snyder. However, she is referred to throughout the transcript as Mrs. Lissauer. When questioned by the Court, the witness stated that she prefers to use the Lissauer name. (T 136)

^{3/} The letter "T" refers to the trial transcript, while reference to Appellant's Appendix is introduced by the letter "A".

discussed. (T 144 - 145)

One week later, the witness testified, Jacobson visited her again and said that she could repay the loan by giving him \$150.00 per week. (T 145) Again, there was no discussion about interest. Mrs. Lissauer maintained the \$150.00 payments for eight or nine weeks into February of 1968. (T 147 - 148) She then asked Mr. Jacobson what balance remained on the loan and how much interest was then due. (T 147) In response, Jacobson allegedly told her that all payments up to that point were interest and that she had not yet begun to repay the principal. (T 148)

Undaunted, Mrs. Lissauer continued her payments into March of 1968. (T 170) In April, 1968, Mrs. Lissauer was visited by two agents of the Internal Revenue Service who threatened to close her shop if payment was not made on back taxes. (T 170 - 171) Despite what Mrs. Lissauer claimed to have been oppressive loan terms established by Jacobson, she once again sought his help. And once again, Jacobson supplied help in the form of \$1,300.00 cash. (T 171) The witness later agreed to repay the monies owed at the rate of between \$175.00 to \$200.00 per week. (T 173) These payments were made weekly throughout the calendar year 1968 and up until March of 1969.

(T 187) The remainder of Mrs. Lissauer's testimony related to particular details which the Government used in an attempt to corroborate her testimony.

Kevin Connolly, an Internal Revenue Service agent, recalled that he was one of two agents who went to Mrs. Lissauer's store in April of 1968 to collect \$1,300.00 under threat of seizure. (T 510) Connolly testified that during his visit, two men appeared and spoke to Lissauer. Immediately thereafter, she handed the agents \$1,300.00 in cash. (T 513) Agent Connolly could not identify Ralph Jacobson as one of the men who appeared in the store. (T 518)

OTHER SIMILAR ACTS TESTIMONY

The Government sought to bolster its case by introducing, over objection by the defense, testimony of others who had allegedly borrowed money from Jacobson at various times. This testimony ranged from that of Joseph Hay, who borrowed \$50.00 on two or three occasions some twelve years prior to the trial (T 418), to Lillian Karika, who testified to substantial loans advanced by Appellant. (T 469 - 479)

ACCOUNTANT TESTIMONY

Michael Bienes, a certified public accountant, testified that he had prepared Ralph Jacobson's 1968 income tax return in April of 1969. (T 44 - 45) This tax return reflected a declaration of \$8,010 in commission income and \$3,440 in miscellaneous income.^{4/} The tax return did not indicate the source of the miscellaneous income.

"Q Did he give you any further indication as to what the \$3,400 represented?

A No, sir.

Q Did he give you any documents or papers to substantiate that?

A No, sir." (T 49)

George Curtis, another public accountant, who filled out and filed Jacobson's 1969 tax return, testified that certain amended returns were filed which pertained to losses from bad debts incurred in 1968 through 1972. (T 81 - 82)

The remainder of the Government's case pertained to the stock transaction which related to Count Two of the indictment on which Jacobson was acquitted.

^{4/} Appellant's 1968 tax return appears in his Appendix at page 198.

THE DEFENSE CASE

The Government's case was contested by a vigorous defense which included some ten witnesses. Six of these witnesses were people whom Mrs. Lissauer initially stated could corroborate the fact that Jacobson made frequent visits to the shop to collect payments. Each of these witnesses testified that they had never seen Jacobson in the store. (T 665, 671, 680, 687, 690) Andrew Caczmarek, a New York City Police Officer, testifying for the defense, was in the dress shop on January 16th, 1969. He found Appellant Jacobson in the shop arguing with Mrs. Lissauer over two dresses that he was attempting to remove from the store. (T 635) Jacobson told the police officer that Mrs. Lissauer owed him \$100.00 or \$150.00 according to the officer's recollection. (T 636) There was no complaint at this time from Mrs. Lissauer that she had been threatened by Jacobson or that he was demanding usurious interest. (T 639)

Judith Rosenblum, Jacobson's niece, explained that in January of 1968, she and her aunt, who is Appellant's wife, ordered garments from Mrs. Lissauer only to receive damaged goods. (T 693 - 694) The damaged dress was never replaced by

Mrs. Lissauer although it had been paid for by Appellant Ralph Jacobson. (T 694) The theory of the defense case was that there had never been a loan transaction, but only a purchase by the Jacobson family, who attempted to obtain either the goods or their monies.

STATUTE INVOLVED

Title 26, United States Code, Section 7206(1) states as follows:

"Any person who --

(1) Declaration under penalties of perjury.
--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;. . ."

CONSTITUTIONAL AMENDMENT INVOLVED

The Fifth Amendment to the United States Constitution states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crimes, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED

1. Whether prosecution of this case was barred by the doctrines of double jeopardy or collateral estoppel? Should the Government be permitted to prosecute an individual for an income tax violation where that individual had previously been acquitted of the same transaction?

2. Whether the Court erred in charging the jury that defendant may be convicted under Section 7206(1) by concealing the fact that certain income described as miscellaneous income was actually interest income if they found an intent to defraud?

POINT I

PROSECUTION OF THIS CASE VIOLATED
BOTH THE SPIRIT AND LETTER OF THE
FIFTH AMENDMENT PROHIBITION AGAINST
DOUBLE JEOPARDY; THE INDICTMENT
HEREIN SHOULD HAVE BEEN DISMISSED.

More than three years ago, Judge Friendly, in United

States v. Cioffi, 487 F.2d 492, 497-98 (2nd Cir., 1973) cautioned that:

"Unless prosecutors take to heart the recommendations for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade."

The prosecution of Ralph Jacobson on a tax violation dramatically illustrates the inherent constitutional problems which are presented when the Government fails to adhere to this advice.

The issue which this Court is now called upon to decide is whether the Fifth Amendment allows the Government to prosecute an individual on an income tax violation where a previous prosecution for another crime on the exact same transaction resulted in acquittal. Appellant submits that whether this issue be earmarked as one of pure double jeopardy, collateral estoppel, due process or a combination of all three, resolution must be made in favor of a defendant who has undergone, albeit successfully, the pain, anxiety and expense of a criminal prosecution on the very same facts. Alternatively, if this Court were to determine that under existing law, the above stated constitutional concepts cannot be applied, it is requested that the Court exercise its supervisory power, United States v. Estepa, 471 F.2d 1132 (2nd Cir., 1972), and dismiss this indictment as

a matter of policy, a policy which the Government identified as its own in Petite v. United States, 361 U.S. 529, 530 (1960):

" . . . that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement."

The issue of whether the Government should be allowed to prosecute a tax case after prior acquittal on the same transaction is presented in crystallized fashion by this case. On June 6th, 1973, Ralph Jacobson was indicted by a federal grand jury in the Eastern District of New York. Counts One and Two of that indictment, docketed as No. 73 CR 522, charged an extortionate credit transaction with Theresa Lissauer in violation of Title 18, United States Code, Section 894. There is no dispute about the fact that the Eastern District case focused upon the exact same loan transaction which formed the predicate of the instant Southern District case.^{5/} In all respects other than the tax return aspect of the instant case, the facts on which both prosecution and defense relied were the same. The Government claimed that Jacobson had made and collected an extortionate

^{5/} The indictment and portions of the Eastern District trial transcript, including summations and the Court's charge, are included in Appellant's Appendix at pp. 24, 37, 41, 50, 109, 152 and 209.

loan to Lissauer and the defense maintained that no such loan had been made and that his troubles with Madam Lissauer were derived from her failure to return monies given for merchandise.

On November 7th, 1974, Appellant was acquitted of all counts on the Eastern District indictment. On April 9th, 1975, after the Government apparently spent some five months licking the wounds of acquittal, the instant indictment followed.

The first order of business in the defense of the Southern District case was a motion to dismiss the indictment upon the ground that inter alia prosecution was barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution.^{6/} Judge Lasker, applying the traditional principles of the collateral estoppel doctrine, Ashe v. Swenson, 397 U.S. 436 (1970); Turner v. Arkansas, 407 U.S. 366 (1972), denied the motion on the theory that the general verdict of the jury in the Eastern District case may have rested on a finding that no threats had been made:

"The verdict of acquittal may well have been grounded on the Government's failure to prove that the defendant had used extortionate means to collect from his debtors,

^{6/} The motion appears in Appellant's Appendix at p.202.

even though loan transactions in fact had been proven. While the defendant's interpretation of the 1973 verdict is certainly plausible, nevertheless, it does not follow, as argued by the defendant, that the jury's verdict in the prior trial necessarily resolved in his favor the issue of the loan transaction which the present indictment raises." (Opinion, p.3) ^{7/}

Before analyzing the relevant constitutional principles, certain additional facts should be brought forth. Jacobson's conviction in the instant case was a culmination, in the truest sense of the word, of the Government's prior unsuccessful attempts to achieve what they finally achieved in this case. In another case tried in the Southern District before Judge Frankel, United States v. Jacobson, Docket No. 75 CR 349, the Government attempted to prove extortionate credit transactions with Lillian Karika and Constantinos Papadopoulos, who appeared as witnesses in the instant case. (T 436, 469) Although Jacobson had been vindicated on the charges before Judge Frankel, these witnesses testified to loan transactions which had previously been aired in Court, to prove other similar acts which would tend to prove that Jacobson had made loans on

^{7/} Judge Lasker's opinion appears in the Appellant's Appendix at pp. 219 through 222.

other occasions. In other words, the Government apparently viewed Judge Lasker's decision on the collateral estoppel matter as a green light to represent evidence which had been rejected by other juries. The prosecutor's indefatigable and relentless effort to convict finally paid off with a modified and streamlined presentation of that which had been presented before.^{8/}

During the instant trial, even the Court became disillusioned when it was apparent what the Government was attempting to do. In excluding other facts on which Appellant had been acquitted, the Court stated that:

"Even if it was not testified to, I am not going to leave it in here. I'm not trying to express any opinion on the merits of this case, but it is cutting the salami very thin, trying to put in material that has been put before other juries and substantially dealt with, whether it constitutes res judicata or not. I am not going to be an agent for the retrial of these matters as a practical matter." (T 493)

The issue then may again be simply stated. Does the

^{8/} Actually, the extortion charges concerning Mrs. Karika and Mr. Papadopoulos were withdrawn by the Government during the trial before Judge Frankel. Nevertheless, counsel in the instant case moved to exclude their testimony upon the grounds of collateral estoppel. (T 429 - 432)

Constitution permit or, alternatively, does this Court want the Government to prosecute or, better stated, reprosecute individuals on tax violations after acquittal on the underlying transaction. The problem which Appellant faces in arguing that this issue should be resolved in his favor is that despite the patent unfairness of such prosecution, present interpretation of the double jeopardy clause provides little comfort. However, this area of constitutional law is a very fluid one indeed.

The winds of possible change in this very important area of constitutional law have been both recognized and appreciated by this Court. United States v. Cioffi, *supra*, 487 F.2d at p.496, Footnote 4; United States v. Mallah, 503 F.2d 971, 985, Footnote 7 (2nd Cir., 1974). As noted in these cases, the potential for change is evidenced in Abbate v. United States, 395 U.S. 187, 196, 201 (1959) (Separate opinion by Justice Brennan); Ashe v. Swenson, *supra* (concurring opinion of Justice Brennan, joined in by Justices Douglas and Marshall). See, also, Simpson v. Florida, 403 U.S. 384, 387 (1971); Harris v. Washington, 404 U.S. 55, 57 (1971); Robinson v. Neil, 409 U.S. 505, 511 (1973).

The present test of whether double jeopardy applies, i.e., that "the evidence required to support a conviction on

one of them [the indictments] would have been sufficient to warrant a conviction upon the other", ^{8/} is shown to be clearly inadequate in light of the facts presented at bar. The Government's case in the Southern District, as in the Eastern District, rested on the issue of Theresa Lissauer's credibility. Her credibility was found insufficient after trial to jury. Flaunting the spirit of the double jeopardy clause and its own "policy", Petite v. United States, *supra*; Markar v. United States, 378 U.S. 723 (1962), the Government took the opportunity to relitigate essentially the same issues by later claiming that another crime arose out of the same transaction.

The practical difficulty of accepting the Government's approach is that affirmance of this conviction would allow the Government to pursue individuals it suspects of wrongdoing with literally no holds barred. If this Court were to affirm, the Government would have the opportunity to bifurcate criminal cases at will in order to reserve a second and perhaps third or fourth opportunity to successfully prosecute a criminal defendant. The number of prosecutions would be only limited by the imagination and discretion of the prosecutor. At the very

^{8/} Blockburger v. United States, 284 U.S. 299 (1932).

least, every crime involving a pecuniary gain could routinely become the subject of two trials. It cannot be expected that this is a result which would be looked upon with favor by this or any other Court. Not only is it unfair to a defendant, but such "split prosecutions" would deal a devastating blow to the orderly administration of criminal justice.

As it exists today, the doctrine of collateral estoppel is equally unworkable as a means of preventing the occurrence or recurrence of fragmented prosecutions. The collateral estoppel test is well-established. There, "the defendant has the burden of establishing that the issue he seeks to foreclose from the second litigation was 'necessarily' resolved in his favor by the first verdict." United States v. Seijo, --- F.2d --- (2nd Cir., June 24th, 1976), slip. at 4387-4390. Although the United States Supreme Court in Ashe v. Swenson, supra, expressly stated that:

"The rule of collateral estoppel in criminal cases is not to be applied with the hyper-technical and archaic approach of a 19th century pleading books, but with realism and rationality.",

this Court has ruled that the defendant's burden of proof "is a heavy one" since "it usually cannot be determined with any certainty upon what basis the previous jury reached its general

verdict." United States v. Seijo, supra; United States v. Gugliaro, 501 F.2d 68 (2nd Cir., 1974); United States v. Tramunti, 500 F.2d 1334 (2nd Cir., 1974).

Appellant Jacobson makes two observations about the present-day doctrine of collateral estoppel as it has evolved in this Circuit. These observations are made in the hope that in a case such as that at bar, the collateral estoppel doctrine would be given a broader application. First, two of the key cases decided in this Circuit, United States v. Gugliaro, supra, and United States v. Tramunti, supra, raised the issue of whether a defendant may be prosecuted for perjury arising out of his testimony at a trial which resulted in his acquittal. The "perjury" situation is clearly distinguishable from the case at bar. There, after indictment, the defendant consciously commits another crime by taking the stand and deliberately giving false testimony. There, the traditional concepts of collateral estoppel are workable. If the jury necessarily believed the defendant's testimony by virtue of the acquittal, the Government should be barred from prosecuting him for perjury. If, on the other hand, the jury could have acquitted him in spite of a finding that the defendant's testimony was

false, a perjury prosecution would be allowed. There, a second prosecution is not nearly as offensive, if offensive at all. In contrast, the instant case presents a situation where it was the Government who merely sat back and decided that Jacobson would endure the pain and anguish of two trials rather than one.

Moreover, wouldn't Appellant have been entitled to know at the time of his first trial that the Government intended to prosecute him for a tax violation? It would seem to have been more fair if the Government had proceeded by obtaining two indictments originally, rather than the one extortion indictment. Then Appellant would have had an opportunity to move to consolidate the two charges. Also, Appellant now faces the major obstacle of dealing with the fact that the Eastern District jury rendered a general verdict and, therefore, that the verdict, because it was a general verdict, does not preclude retrial under the collateral estoppel doctrine. If Appellant had been made aware of the tax charges at the time of the Eastern District trial, he would have had the opportunity to request a determination as to whether the jury found that a loan had been made. The fact none of these potential remedies were available because the Government chose to "blindsides" the defendant with

a second indictment five months after his acquittal, dramatizes the inherent unfairness in this procedure.

In pursuing reversal and dismissal of this indictment, Appellant may have to rely on whatever is left of the due process approach taken in Hoag v. State of New Jersey, 356 U.S. 464 (1958). Unlike Hoag or Block v. State of North Carolina, 344 U.S. 424 (1953), there were here no reluctant witnesses or unexpected turn of events for the Government. The prosecution in this case represented nothing less than an attempt "to wear the accused out by a multitude of cases with accumulated trials." Palko v. State of Connecticut, 302 U.S. 319, 328 (1937).

In United States v. Sabella, 272 F.2d 206 (2nd Cir., 1959), this Court stated that:

"The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone: The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he may be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The Government should have but

one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriadum." 272 F.2d at 212

In the instant case, the "additional fact" of an alleged false statement on an income tax return is not "significant" because it represents nothing more than a deceptive ploy which would enable the Government to get Jacobson back into Court to retry the Lissauer matter. There could have been no complaint here if the Government had initially indicted Jacobson for both the Section 894 violation and the tax violation.^{9/} Instead, the Government relied, and thus far successfully, on the adage that if at once you don't succeed, try, and in this case literally, try again. Such an approach, it is submitted, is antithetical to a fair and just disposition of criminal cases.

^{9/} At all times relevant to this case, Jacobson was a resident of the Eastern District of New York. Therefore, there would have been no venue problems with returning one indictment in the Eastern District.

POINT II

THE TRIAL COURT'S CHARGE ON
TITLE 26, UNITED STATES CODE,
SECTION 7206(1) WAS ERRONEOUS.

Count One, the single count on which Appellant was convicted, charged that Ralph Jacobson submitted an income tax return for the calendar year 1968 which falsely understated joint taxable income in the amount of \$5,010.00.^{10/} Theresa Lissauer claimed that in 1968 she borrowed more than \$3,000.00 from Ralph Jacobson. (T 144, 171, 181)^{11/} Mrs. Lissauer testified that from January, 1968 to March of 1969, she paid a minimum of \$150.00 per week on the loans. The only testimony regarding interest pertained to the eight or nine payments of \$150.00 which were made in January and February of 1968. (T 147 - 148) It was at this time that Jacobson allegedly told the witness that these payments represented only interest. (T 148) Later,

^{10/} Jacobson's 1968 tax return is included in Appellant's Appendix at p.198. It should be noted that the indictment refers to taxable income. In 1968, Appellant declared gross income in the amount of \$12,500.

^{11/} The record, at p.171, indicates that the second loan was in the amount of \$1,500.00. This is a typographical error. According to the testimony, this second loan was in the amount of \$1,300.00. (T 181)

in April of 1968, when the witness was allegedly given another \$1,300.00, the witness agreed to repay at the rate of \$200.00 per week or as close to that as she could afford. (T 173)

There was, according to the witness' own testimony, nothing to indicate that these payments represented interest as opposed to repayment of principle.

"I asked how much I would have to pay him now.

He said I will have to pay him \$200 a week.

Q What would those payments represent?
Did he indicate that to you?

Not at the time, no." (T 173)

The Government attorney then established that the witness made payments of at least \$150.00 per week, sometimes more, throughout 1968 and up until March of 1969. (T 187)

Certainly if the jury believed that Lissauer had made these payments as regularly as she indicated, in the amount that she indicated, it could have found, as they apparently did, that Jacobson falsely understated his income. However, it is submitted that an erroneous charge by the Court may well have improperly led to conviction.

The problem involved in this issue was first raised during defense counsel's summation. With regard to Count Two,

which charged in part Appellant's failure to report a capital gain transaction, counsel argued that:

"Because he didn't know enough to report it on the return and to go through this complicated formula of capital gains, he had the intent to perjury himself? Says Mr. Frankel, what about 1972? ^{12/} Look at the 1972 return. Show me where the \$3,000 is that he earned on Davos stock. Why is it not in the place where the stock went? There is nothing there."

"There is nothing there except for one thing:
The law doesn't require him to put it there.
The law doesn't require him to put it there.
As long as he reports it, the law does not
require him to put it there.

There is one line on this return that has income other than wages, dividends and interest, \$6,933.33. They have to prove to you beyond a reasonable doubt, ladies and gentlemen that that doesn't include the \$3,000, and you tell me one piece of evidence in this case that you have heard.

THE COURT: I will have to advise the jury as to the question of intent.

MR. LA ROSSA: The law says the IRS Code -

THE COURT: It requires if you make a gain on the sale of stock or other assets you report it on what is called a schedule D.

MR. LA ROSSA: I agree with that, but I am

^{12/} The 1972 return was admitted under the other similar acts theory.

saying to you that the law also permits you with respect to criminal responsibility -

THE COURT: Even if the law requires you to put it on schedule D, unless you believe that the defendant intended not to put it on schedule D or negligibly put it somewhere else, you find that, you could not convict.

MR. LA ROSSA: I am afraid I don't agree with the Court. I refer your Honor to the Sullivan ^{13/} decision." (T 779 - 780)

Following the summation, at a pre-charge conference, the question of what constitutes a false statement was again aired, again focusing on 1969 and the capital gain transaction. The Court stated that:

"What I think you mean and what I would be willing to approve is that even though the law says that for tax purposes you are required to report on schedule D, nevertheless the failure to do so would not constitute a false statement within the meaning here involved if the income is reported elsewhere on the return, unless you find that by reporting it somewhere else on the return, the defendant intended to defraud the government.

MR. LA ROSSA: That's not accurate, As long as you report the income it does not make any difference what section is required. I am talking of criminal purposes." (A 224)

It should be remembered that Mr. Jacobson, in this indictment, was not charged with failure to supply information under Title 26, United States Code, Section 7203, or fraud under Section 7201. Here, the charge was that of perjury and

^{13/} United States v. Sullivan, 274 U.S. 259 (1927)

the issue for the jury was simply whether the defendant submitted a false income tax return. Trial counsel requested that the jury be instructed as follows:

"The law requires that all material matters on an income tax return be truthful. That is to say that the taxpayer must believe all material statements to be true. The law does not require the taxpayer to identify his source of income. As long as the taxpayer has reported his income there is no violation of this statute by the fact that a particular source or transaction was not identified." (A 225)

Instead, the Court stated that:

"For example - and this is an example that Mr. La Rossa raised yesterday, and I said something about during his summation - as to the reporting of capital gains on the sale of the Davos stock. The Internal Revenue Code requires such a gain must be reported on the tax return, and the regulations or the law require that the proper place to report a capital gain is on schedule D of your tax return. However, even though the Internal Revenue Code says that a taxpayer must report a capital gain on schedule D, nevertheless a taxpayer's failure to report it there would not constitute a false statement under the statute we are dealing with so long as you find that the income involved is reported elsewhere on the return, unless you find that when the defendant reported it elsewhere on his return he intended to defraud the government." (A 240 - 241, emphasis supplied)

Again, it is submitted that "defrauding the government" was not the charge here and this factor should have taken no part in the jury's deliberation. This problem became even

more acute and finally focused on the 1968 return after the jury began to deliberate. First, as developed in the Statement of Facts, Appellant's 1968 income tax return included \$3,440.00 which was labeled as miscellaneous income. The jury asked the following:

"We would like to clarify the meaning of miscellaneous income reported on the 1968 return. Could said income possibly include various interest income?" (A 260)

Following the theme which had already been discussed and on which a record had been made, the Court gave the following supplementary instructions:

"Mr. Sherman [jury foreman], that is a perfectly good question, but at least in my mind it could have two possible meanings, or you might be asking one of two questions. The two questions are: Did you mean that the proper way to report income might possibly be to put it under miscellaneous income or, the second question might mean: May Mr. Jacobson possibly have done it on his own.

Can you tell me which of these two questions you mean?

THE FOREMAN: The first question is what we were more or less trying to decide.

THE COURT: Let me try to answer both questions.

The first question is a question of law. What is the law about reporting interest income?

Civil law, not criminal law, requires that interest income is supposed to be reported under interest income. You may have noticed on the return, if you examined it, in the middle of the left hand side of the second page, there is a place for interest income. However, as I told you this morning, nobody can be convicted merely for putting an item of income in the wrong box, unless you find that by putting it in the wrong box that person intended to defraud the government.

The second question is a question of fact, and that is: May Mr. Jacobson actually have put that interest income in a miscellaneous item?

That's something I cannot answer. If that's a question in your mind, that is a question which you must answer from the evidence that is in the record." (T 261 - 262, emphasis supplied)

Under the instructions set forth above, the jury could have found that Jacobson reported the income but intended to defraud the Government by concealing the fact that it was interest income. In fact, such reasoning is quite logical. In light of the fact that this case really boils down to the retrial of an extortion-shylocking case, one would ordinarily not choose to identify the transaction in his submission to the Government. Appellant claims, however, that there is no authority to support the proposition that failure to identify a source of income for whatever reason can constitute a violation of Section 7206(1). As noted above, it may be conceivable

that a literal application of Section 7203 might apply. Injecting this element into an alleged 7206 violation was completely improper.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of Conviction herein should be reversed and the indictment dismissed; in the alternative, the case should be remanded for a new trial.

Respectfully submitted,

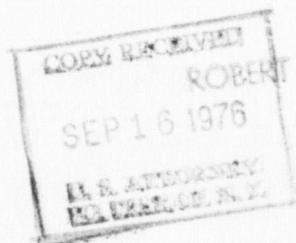
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Of Counsel

Service of three ③ copies of the within
is admitted this 16 day of September 1976

*United States Attorney for the
Southern District*

3 cys received



ROBERT B. FISKE JR.